

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 February 2020

Public Authority: Highways England
Address: Piccadilly Gate
Store Street
Manchester
M1 2WD

Decision (including any steps ordered)

1. The complainant has requested information about salary and bonus payments to staff at Senior Level 1 and above. Highways England refused to disclose some of the requested information citing section 22 which was intended for future publication and the remaining information was withheld under section 43(2) FOIA.
2. The Commissioner's decision is that Highways England was correct to refuse to disclose Senior 3 pay/reward information for 2018/2019 under section 22 FOIA. It incorrectly applied section 43(2) FOIA to the remaining withheld information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information withheld under section 43(2) FOIA.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 25 July 2019 the complainant made the following request for information under the FOIA for:
 1. What was the total amount paid in bonuses to staff at senior level 1 and senior level 2 or above for 2018-19?
 2. What was the mean bonus paid to staff at senior level 1 and senior level 2 or above for 2018-19?
 3. What was the median bonus paid to staff at senior level 1 and senior level 2 or above for 2018-19?
 4. What was the highest amount paid as a bonus to any member of staff in 2018-19?
 5. What is the current mean salary paid to staff at senior level 1 and senior level 2 or above?
 6. What is the current median salary paid to staff at senior level 1 and senior level 2 or above?
 7. How many staff are employed at senior level 1 and senior level 2 or above? If 2018-19 figures are not available, please provide for 2017-18 but be clear which figures relate to which year. For 'senior level 1 and senior level 2' include any equivalent grade names for those above pay band 8."
6. On 16 September 2019 Highways England responded. It provided a response to part 7 of the request, it refused to disclose the information requested at part 4 under section 21 as it said this was publicly accessible and it refused to disclose the remaining information under section 43 FOIA.
7. The complainant requested an internal review on 16 September 2019. Highways England sent the outcome of its internal review on 11 October 2019. It confirmed that the information withheld under section 21 in relation to part 4 of the request related to the year 17/18, it said that equivalent information for the year 18/19 was exempt under section 22 FOIA as it was intended for future publication. It upheld its application of section 43 FOIA to all other withheld information (not intended for future publication).

Scope of the case

8. The complainant contacted the Commissioner on 28 August 2019 to complain about the way her request for information had been handled.
9. HE confirmed that Senior 3 pay/reward information for 2018/2019 is published in the annual report (which had not been published at the time of the request). The Commissioner considers the scope of her investigation to determine whether Highways England is entitled to rely on section 22 in relation to Senior 3 pay/reward information for the year 18/19 and section 43(2) FOIA to refuse to disclose any of the other requested information.

Reasons for decision

Section 22

10. Section 22 FOIA states that information is exempt information if—
 - (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),
 - (b) the information was already held with a view to such publication at the time when the request for information was made, and
 - (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).
11. Highways England explained it is mandatorily required to report Senior 3 pay/reward information as part of the annual report. The production of the annual report is required to be laid before Parliament by mid-July each year and is published on Highways England's web page shortly after this has occurred.
12. The annual report for 2019, which contains the 2017/18 payment, had just been recently published prior to the receiving the request in this case. A link to Highways England's web page was provided to the complainant. It was therefore considered reasonable to withhold the 2018/19 payment, which would be included in the 2020 annual report, until the annual report for this year had been laid before Parliament.
13. Therefore, based on the idea that the figures are reported every year in a publicly available document and the requester in her initial request stated that 'if the 2018-19 figures are not available, please provide for

2017-18' which was done so in this case; Highways England believe that it was reasonable to withhold the information in this circumstance.

14. Based upon Highways England's submissions above, the Commissioner is satisfied that the information to which section 22 had been applied was held at the time of the request with a plan to publish within the annual report for the year 2020. She is also satisfied that it was reasonable to withhold the information prior to the planned publication given the requested information is published annually, the complainant appears to accept that the 2018-2019 figures may not have been available at the time of the request and the previous year's figures which had been reported upon were publicly available.
15. The Commissioner does therefore consider that section 22 is engaged in this case, however as this is a qualified exemption, she has gone on to consider the public interest test.

Public interest arguments in favour of disclosing the requested Information

16. Highways England presented the following public interest arguments in favour of disclosure (these were in fact presented in relation to the application of section 43(2) however as the public interest factors in favour of disclosure do not have to relate to a specific exemption the Commissioner has also considered these arguments in the context of section 22 FOIA):
 - There is a clear public interest in the work of government being closely examined to encourage the discharging of public functions in the most efficient and effective way;
 - There is an important public interest in the work of public bodies being transparent and open to scrutiny to increase diligence and to protect the public purse;
 - There is a public interest in disclosing information about the remuneration of Senior Managers in Government owned company's public procurements to ensure there is transparency in the spending of public money and that public bodies are getting value for money when employing senior managers.

Public interest arguments in favour of maintaining the exemption

17. Highways England has not presented any specific public interest arguments in favour of maintaining section 22 FOIA

Balance of the public interest arguments

18. The Commissioner considers that there is a strong public interest in disclosure of information relevant to the spending of public funds and public authorities must be held to account for their spending.
19. The Commissioner also considers that there is a public interest in enabling public authorities to account for their spending within their yearly annual report rather than collating this information at various other points during the financial year
20. On balance the Commissioner considers that Highways England is held to account by production of its annual report and that the public interest lies with allowing Highways England to provide this information in line with its planned publication process.

Section 43(2) – prejudice to commercial interests

21. Section 43(2) says that information is exempt information if its disclosure under the FOIA would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). Trade secrets are one example of commercial interests but the concept is far wider. Commercial interest relates to a person's ability to participate competitively in a commercial activity ie the purchase and sale of goods or services.
22. In order for the exemption to be engaged Highways England would need to demonstrate that disclosing the information would result in some identifiable commercial prejudice which would, or would be likely to, affect one or more parties. Section 43(2) is a qualified exemption and is therefore subject to the public interest test.
23. Highways England has said that disclosure would be likely to prejudice its ability to attract and retain suitable staff to deliver its challenging program of work in competition with commercial organisations with whom it competes for talent.
24. Highways England has provided the information being withheld under this exemption to the Commissioner. The Commissioner is satisfied that the withheld information relates to a commercial activity i.e. attracting suitable staff to deliver its business objectives.

Likelihood of prejudice occurring

25. The ICO has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. The Tribunal has been clear that this phrase means that there are two

possible limbs upon which a prejudice based exemption can be engaged; ie either prejudice 'would' occur or prejudice 'would be likely to' occur.

26. With regard to 'would be likely to prejudice', the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15).
27. With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).
28. It is Highways England's belief that disclosure of its reward packages would be likely to increase successful targeting of its employees, consequentially impacting on its ability to deliver its challenging programme of work. It confirmed that this would be likely to have a negative commercial impact. Highways England provided further submissions which are detailed in the Confidential Annex attached to this Notice.
29. In this case the request relates to salary and bonus payments and does not cover any other information which may typically be included within a rewards package. It relates to overall, mean and median salary and bonus payments. The Commissioner does not consider that disclosure of the withheld information in this case would be likely to be able to be used by Highways England's competitors to poach staff in any targeted way. Further analysis of the Commissioner's reasoning in this case is detailed in the Confidential Annex attached to this Notice. The Commissioner does not consider that section 43(2) is engaged in relation to the withheld information.

Right of appeal

30. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504
Fax: 0870 739 5836
Email: grc@Justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

31. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
32. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed.....

Gemma Garvey
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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Cheshire
SK9 5AF